No. 09-697

Supreme Court, U.S.
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In The

Supreme Court of the United States

TOM ROBINSON AND ROBERT TYGARD,

Petitioners,

v.

CANDACE LEHMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Contrary to *Scott* v. *Harris*, The Ninth Circuit Ignored Conclusive Videotape Evidence That Officers Robinson and Tygard Acted Reasonably 2

II. The Ninth Circuit Disregarded This Court's Qualified Immunity Standards in Finding that Officers Robinson and Tygard Violated Clearly Established Law 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Acosta v. *City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996).....7, 8

Brosseau v. *Haugen*, 543 U.S. 194 (2004).....10

City and County of San Francisco v. *Rodis*, 129 S. Ct. 1036 (2009).....10

Deorle v. *Rutherford*, 272 F.3d 1272 (9th Cir. 2001).....7, 8, 9

Graham v. *Connor*, 490 U.S. 386 (1989).....2

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982).....1, 7

Hunter v. *Bryant*, 502 U.S. 224 (1991) 9

Hust v. *Phillips*, 129 S. Ct. 1036 (2009).....10

Lehman v. *Robinson*, 228 Fed. App'x 697 (9th Cir. 2007).....4, 5, 6, 7, 8

Mireles v. *Waco*, 502 U.S. 9 (1991).....10

Mitchell v. *Forsyth*, 472 U.S. 511 (1985).....9

Robinson v. *Lehman*, 552 U.S. 1172 (2008).....3, 10

Saucier v. *Katz*, 533 U.S. 194 (2001) 7

Scott v. *Harris*, 550 U.S. 372 (2007).....*passim*

Tennessee v. *Garner*, 471 U.S. 1 (1985) 2

Yawczak v. *Acosta*, 519 U.S. 1009 (1996).....7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Fed. R. Civ. P. 56(c) 2

Sup. Ct. R. 10(a) 1, 10

ARGUMENT

In this case, as in *Scott* v. *Harris*, this Court need not guess whether Officers Robinson and Tygard were justified in using deadly force against Joshua Lehman. 550 U.S. 372 (2007). Two undisputed police videotapes in the record conclusively prove that the officers acted reasonably under the Fourth Amendment. It is even clearer that the officers are entitled to qualified immunity under *Harlow* v. *Fitzgerald* because they violated no clearly established law. 457 U.S. 800, 812 (1982). Tellingly, Respondent's Brief in Opposition contests none of the petition's case law supporting that conclusion.

This Court has previously granted certiorari, vacated, and remanded this case to the Ninth Circuit in light of *Scott*, specifically to consider the videotapes and whether they clearly contradict Respondent's version of the facts. On remand, the Ninth Circuit refused to apply *Scott* faithfully and ignored the plain import of the videotapes. After reviewing the petition, this Court called for the record and presumably reviewed the videotapes before calling for a response to the petition, satisfying itself that the videotapes clearly contradict Respondent's and the Ninth Circuit's accounts. Because the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," Sup. Ct. R. 10(a), summary reversal is warranted.

I. Contrary to *Scott* v. *Harris*, The Ninth Circuit Ignored Conclusive Videotape Evidence That Officers Robinson and Tygard Acted Reasonably

Police officers have a Fourth Amendment duty to act with objective reasonableness when using deadly force on a suspect resisting arrest. *Graham* v. *Connor*, 490 U.S. 386, 399 (1989). "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). To assess reasonableness, the court balances the nature and quality of the intrusion against the governmental interests by considering the "totality of the circumstances." *Id.* at 8-9. This inquiry is bounded neither by "rigid preconditions" nor a "magical on/off switch." *Scott*, 550 U.S. at 382. "[A]ll that matters" is whether the officer acted reasonably in the particular context. *Id.* at 383.

As this Court held in *Scott,* where the record contains a videotape, the court should view the facts "in the light depicted by the videotape." *Id.* at 381. Ordinarily, at the summary judgment stage, the court must view the facts in the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c). But this rule applies only to "genuine" disputes of material facts. Where authentic, clear video evidence captures the key facts, there can be no genuine dispute of material fact and the videotape controls. *Scott* held that a

police videotape of a dangerous high-speed chase conclusively proved that the officers' use of deadly force was objectively reasonable. *Id.* at 386. Where such a videotape exists, its evidence controls rather than "the story told by respondent and adopted by the Court of Appeals." *Id.* at 378.

Just as in *Scott*, the record in this case contains authentic police video evidence depicting Lehman's final standoff with police officers. Respondent does not dispute any aspect of the videotapes' accuracy or authenticity. Based on this evidence, in 2008 this Court directed the Ninth Circuit to reconsider its decision in light of *Scott*. *Robinson* v. *Lehman*, 552 U.S. 1172 (2008) (granting certiorari, vacating, and remanding). On remand, the Ninth Circuit refused to engage with this Court's precedent in *Scott*. Instead it adopted Respondent's version of the facts, relying in part on selected deposition statements, even when the videotapes blatantly contradicted and discredited those accounts.

The two videotapes conclusively refute this account. They prove that Lehman posed a serious risk of physical harm to the police officers and members of the public nearby. They thus confirm that an objective officer could reasonably have believed that deadly force was necessary. Only by mischaracterizing or ignoring this dispositive video evidence can the Ninth Circuit and Respondent contend otherwise.

First, the videotapes conclusively prove that Lehman continued to pose a serious risk of physical

harm. His truck, even with blown-out tires, remained operational as a deadly weapon. After officers had spent many tense minutes trying first to defuse the situation and then to use non-lethal force, Lehman suddenly put his truck into reverse and rammed a police car behind him. This ramming is what precipitated the officers' shots. *See* Video 1 at 17:02:06 (showing Lehman suddenly reversing the truck); Video 2 at 37:53 (same); *id.* at 46:53 (showing the back of Lehman's truck touching a police SUV). Despite this clear video evidence, the Ninth Circuit said nothing about the truck's continuing ability to inflict physical harm or its ramming of a police SUV. *See Lehman* v. *Robinson*, 228 Fed. App'x 697, 699-700, Pet. App. 6a-7a (9th Cir. 2007). *Cf.* Opp. 3 ("Robinson knew [the only weapon] Lehman had was a knife.").

Second, the videotapes conclusively prove that officers were close enough to the truck to be injured or killed once it spun into motion. Many police officers were around the truck and in harm's way once Lehman reversed the truck, including an officer who was seen directly behind Lehman's rear bumper just minutes before the shooting. *See* Video 1 at 16:59:17 (showing one officer directly behind and two officers near the rear of the truck three minutes before the shooting); Video 2 at 37:30 (showing 6-8 officers in motion on the driver's side of the truck). At a minimum, Officers Robinson and Tygard could reasonably have believed that their fellow officers were in harm's way. Despite this clear video evidence, Respondent contends that some people at the scene

did not notice any officers behind the truck. *See* Opp. 2, 4, 8, 9.

Third, the videotapes conclusively prove that Lehman had multiple escape routes. Most prominently, he could have driven north or south via the unobstructed shoulder in front of him. *See* Video 2 at 44:53 (showing a close-up of the off-road shoulder completely unobstructed). Despite this clear video evidence, Respondent and the Ninth Circuit argue that all escape routes were blocked. *See* Opp. 3, 7; *Lehman*, 228 Fed. App'x at 699, Pet. App. 6a.

Fourth, the videotapes conclusively prove that scores of cars and several bystanders remained present and in harm's way during the standoff. *See* Video 2 at 33:45 (showing a bystander walk near Lehman's truck); Video 1 at 16:50:00 (showing a line of approximately 30 civilian cars to the right of Lehman's truck); Video 2 at 43:03 (showing a long line of civilian cars approximately 100 yards to the left of Lehman's truck). Not only were these bystanders potential targets, but their presence would have limited the officers' ability to use force against Lehman if he had begun to escape farther. Despite this clear video evidence, Respondent and the Ninth Circuit contend that no citizens were in danger. *See* Opp. 2; *Lehman*, 228 Fed. App'x at 699, Pet. App. 7a ("The area had also been cleared of pedestrians.").

Finally, the videotapes conclusively prove that the police acted reasonably by steadily escalating their responses to Lehman's escalating threat. As

Lehman began to move and act more, the police steadily grew more alert and active and steadily used more force, leading up to the shots fired by Officers Robinson and Tygard. *See* Video 1 at 17:01:35 (showing Lehman moving in the truck and officers circling the truck), 17:01:50 (showing officers yelling with guns drawn); Video 2 at 37:05 (showing officers training their guns on Lehman), 37:00-37:54 (showing Lehman moving inside the truck), 37:27 (showing officers tasering Lehman and circling the truck); 37:50 (showing officers beating the passenger-side window in an effort to gain access to the truck). Despite this clear video evidence, Respondent and the Ninth Circuit portray Lehman as calm, compliant, and little threat to the officers. *See Lehman*, 228 Fed. App'x at 699, Pet. App. 7a (describing Lehman as "partially subdued" and omitting any reference to his reversing the truck); Opp. 2 ("Progress was being made on negotiations, and there was dialogue.").

Even after this Court's vacatur and remand, the Ninth Circuit flouted *Scott* by ignoring the evidence of two indisputably accurate videotapes. Thus, summary reversal is warranted. This Court has seen the video evidence, and its content speaks for itself.

II. The Ninth Circuit Disregarded This Court's Qualified Immunity Standards in Finding that Officers Robinson and Tygard Violated Clearly Established Law

The Ninth Circuit significantly departed from this Court's qualified immunity standards when it

held that Officers Robinson and Tygard violated clearly established law. Officers are entitled to qualified immunity so long as they do not violate legal rights that were clearly established at the time. *Harlow*, 457 U.S. at 812. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001).

In April 2002, no clearly established law forbade the use of deadly force in the situation at hand. Quite the opposite: in at least four cases, courts confronted with similar facts had granted officers immunity from suit. Pet. 29-34. Tellingly, Respondent's brief in opposition does not dispute a single case highlighted in the petition. Opp. 9-13. Nor does it defend the Ninth Circuit's misplaced reliance on Judge Reinhardt's opinions in *Acosta* v. *City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996), *cert. denied sub nom. Yawczak* v. *Acosta*, 519 U.S. 1009 (1996), and *Deorle* v. *Rutherford*, 272 F.3d 1272 (9th Cir. 2001), as clearly established law governing the situation at hand. The panel cited *Acosta* for the proposition that "an officer 'shooting at the driver of a slow-moving car' was not entitled to qualified immunity, especially when 'a reasonable officer . . . would have recognized that he could avoid being injured by simply stepping to the side.'" *Lehman*, 228 Fed. App'x at 700, Pet. App. 8a (citations omitted). It provided no analysis of *Acosta* beyond this citation.

The panel then analogized *Deorle* to the case at hand in two sentences:

> In *Deorle* v. *Rutherford*, 272 F.3d 1272, 1285-86 (9th Cir. 2001), we held that even in a non-lethal police shooting under circumstances otherwise similar to those here, the officers were not entitled to qualified immunity. As in Lehman's case, the shooting in *Deorle* occurred in the presence of a large number of police officers, without any "warning of the imminent use of such a significant degree of force," and was directed at a mentally disturbed individual who had "committed no serious offense . . . " *Id.*

Lehman, 228 Fed. App'x at 700, Pet. App. 8a.

Respondent does not support the Ninth Circuit's reliance on *Acosta* and *Deorle* because she cannot. Neither case would have provided Officers Robinson and Tygard with reasonable notice that their conduct was unconstitutional. Pet. 27-28. In *Acosta*, an officer was denied qualified immunity when he shot and killed the driver of a vehicle who had stolen a woman's purse. 83 F.3d at 1144. The officer himself was to the side of the car and was not directly in danger, no other officers or third persons were threatened with harm, and the car was rolling so slowly that the officer could easily have stepped aside. *Id.* at 1147-48. Lehman, in stark contrast to the purse-snatchers in *Acosta*, presented a significant threat to the safety of officers and innocent third parties alike. Pet. 9-10.

Similarly misplaced was the panel's reliance on *Deorle*. There, the court denied qualified immunity to an officer who was safely positioned behind a tree, yet rather than retreat, shot an unarmed, emotionally disturbed man in the face with a lead-filled beanbag. *Deorle*, 272 F.3d at 1276-78. The man had "committed no serious offense, [was] mentally or emotionally disturbed, [was] given no warning of the imminent use of such a significant degree of force, pose[d] no risk of flight, and present[ed] no objectively reasonable threat to the safety of the officer or other individuals." *Id.* at 1285. Again, in contrast to the facts of that case, here Lehman had committed numerous felonies, posed a risk of flight, and presented an objectively reasonable threat to the safety of officers and innocent third parties alike. Pet. 9-10, 16. The Ninth Circuit erred in treating these two inapposite cases as giving the officers notice that their conduct was clearly unlawful.

Respondent's silence on qualified immunity is deafening and effectively concedes that the Ninth Circuit erred. Doctrines of qualified immunity are designed to spare officers the burden of litigation and trial. Thus, this Court has repeatedly reviewed denials of summary judgment in cases interpreting the scope of qualified immunity. *See, e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985); *Hunter* v. *Bryant*, 502 U.S. 224, 227-28 (1991) (per curiam) (noting that "because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability, we repeatedly have stressed the importance of resolving

immunity questions at the earliest possible stage of the litigation." (internal citations omitted)); *Scott*, 550 U.S. at 376 n.2.

This Court has previously summarily reversed the Ninth Circuit for its "clear misapprehension of the qualified immunity standard." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam); *see Mireles* v. *Waco*, 502 U.S. 9 (1991) (per curiam) (summarily reversing the Ninth Circuit on judicial immunity). It also frequently grants certiorari, vacates, and remands Ninth Circuit opinions on qualified immunity. *See, e.g.*, *Hust* v. *Phillips*, 129 S. Ct. 1036 (2009); *City and County of San Francisco* v. *Rodis*, 129 S. Ct. 1036 (2009). It has already done so once in this case. 552 U.S. 1172 (2008) (granting certiorari, vacating, and remanding in light of *Scott*). The Ninth Circuit has again ignored this Court's guidance in *Scott*. Given the Ninth Circuit's obstinacy, this Court's exercise of its supervisory powers is warranted, so summary reversal is appropriate. *See* Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, this Court should summarily reverse the decision below. In the alternative, it should grant the petition for a writ of certiorari.

Respectfully submitted,

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